No. 392

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1947.

FRANK R. CREEDON, HOUSING EXPEDITER, OFFICE OF THE HOUSING EXPEDITER, PETITIONER,

v.

CHARLES STONE, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE

NORMA L. COMSTOCK,
Amicus Curiae

EASTWOOD PRINTING CO., 2031 CURTIS STREET, DENVER

IN THE

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The undersigned member of the Bar of this Court moves that leave be granted to file a brief *amicus curiae* herein for these reasons:

The point to be presented and argued in this brief of *amicus curiae* was never presented to or considered by either of the lower courts. That point is: The Housing Expediter has pursued in this case and many others, and obviously intends to continue to pursue, a remedy which does not exist where, as here, the basis of suit is a violation of an order to refund rent, and has thereby forfeited the rights of tenants to have the refunds paid to them, in that he has been prosecuting actions on behalf of the United States for treble damages, payable exclusively into the United States Treasury, under Section 205(e) of the Emergency Price Control

Act, when in fact the only remedy available is an action by the Housing Expediter under Section 205(a) of the Act by way of restitution or refund for the benefit exclusively of the aggrieved tenant.

The matter is of vital importance in that the courts have erroneously assumed, without actually considering the matter at all, that a treble damage action on behalf of the United States is an available remedy, and by so doing have forfeited the rent refund rights expressly granted to tenants by Section 4(e) of the Rent Regulation for Housing.

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IN THE

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BRIEF OF AMICUS CURIAE

Amicus curiae respectfully suggest that the judgment of the Circuit Court of Appeals should be reversed and be remanded with instructions to order dismissal of this action for the reason that a failure to obey a refund order issued under Section 4(e) of the Rent Regulation for Housing, as amended (8 F.R. 14663, 10 F.R. 3436), *not* prescribing a maximum rent, but issued simply as an adjunct to a separable rent deduction order issued under a different section, 5 (c)(1), of the Regulation, does not give rise to a claim for relief under Subsection (e) of Section 205 of the Emergency Price Control Act of 1942 as amended (56 Stat 23, 33, 50 U.S.C. App. 925; 58 Stat. 632, 640, 50 U.S.C. App. Supp. V, 925), in either the tenant or in the Housing Expediter, as successor to the Price Administrator; but gives rise only to a proceeding by the Housing Expediter under Subsec-

tion (a) of Section 205 of the Act to secure a judgment of restitution or refund against the landlord for the sole use and benefit of the tenant.

MATTER ACCEPTED

Petitioner's statements as to the jurisdiction of this Court and as to the statute and regulation involved are accepted. It is also conceded that a refund order may be validly issued as an adjunct to a rent reduction order, although it can be enforced only by a proceeding under Subsection (a) of Section 205 of the Act.

QUESTION PRESENTED

The sole method of enforcement of a refund order issued under Section 4(e) of the Rent Regulation for Housing is a proceeding by the Housing Expediter under Section 205(e) of the Act to compel a refund of the ordered amounts to the tenant, for whose exclusive benefit such refunds were contemplated by the Regulation and whose interests are forfeited when an action is instituted on behalf of the United States under Section 205(e) of the Act.

It is the position of *amicus curiae* that no question of a statute of limitations is involved.

STATEMENT

Petitioner's statement of the case is accepted, but it is suggested that the particular facts in this case present a flagrant example of defiance of the Act and the Regulation, and that consideration should be given by the Court to the fact that its decision herein may well affect a landlord whose failure to make timely filing under Section 7 of the Regulation was due to lack of actual knowledge of the registration requirement, or one whose filing was but a few days late, but against whom the Price Administrator or the Housing Expediter, as the case may be, nevertheless determined to supplement the rent reduction order by a refund order.

Attention is directed to the facts that: (1) In reducing a first rent under authority of Section 5(c)(1) of the Rent Regulation, the sole permissible test is whether such first rent is "higher than the rent generally prevailing in the

Defense-Rental Area for comparable housing accommodations"; (2) a failure of the landlord to make timely registration is *not* a ground for rent reduction, and (3) if the landlord has failed to register at all, as in this case, but the first rent in fact is not "higher than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations," the sole remedies against the landlord for failure to register are the injunctive and criminal sanctions provided by Section 205(a) and Section 4 of the Act and specifically reserved by the Administrator in the last sentence in Section 4(e) of the Rent Regulation.

Attention is further called to the fact that the Rent Regulation notifies the tenant only of his right to a refund and does not mention a suit for treble damages under Section 205(e), and to the fact that a suit by the Housing Expediter on behalf of the United States forecloses any relief to the tenant. *Section* 205(*e*).

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in assuming that a claim for relief existed under Section 205(e) of the Emergency Price Control Act of 1942, as amended, because of failure to obey a refund order issued under Section 4(e) of the Rent Regulation for Housing. The District Court should have been instructed to dismiss the action.

SUMMARY OF ARGUMENT

An order issued under Section 4(e) of the Rent Regulation commanding the refund to the tenant of rent amounts which were legal when charged and collected is merely a separable and optional adjunct to a rent reduction order issued under Section 5(c)(1) of such Regulation, and is not an order "prescribing" a maximum rent within the scope and intendment of Section 205(e) of the Emergency Price Control Act of 1942, as amended. Section 205(e) is penal in character, and the Price Administrator was without power to visit penal consequences upon an act which was lawful when done. A refund can be enforced only in an action for the benefit of the tenant under Section 205(a) of the Act.

ARGUMENT

In none of the reported federal decisions in like cases, and specifically in neither the instant case (163 F.2d 393) nor in *Creedon v. Babcock*, 163 F.2d 480 (C.C.A. 4th, 1947) does the point now raised by *amicus curiae* appear to have been presented or considered. Nor is it presented by either petitioner or respondent here. The matter considered in all of such reported decisions was solely the question of when the statute of limitations began to run. Those courts simply assumed the fallacious premise that disobedience of a refund order created a claim for treble damages under Section 205 (e) of the Act, and from that springboard carried on to conclusions sharply tangential to the true inquiry. A clear and dispositive statement of the true question and answer is found in the opinion in *Fleming, Administrator v. Banks*, decided October 3, 1947, by the Appellate Department of the Superior Court, Los Angeles, California. A true copy of the opinion, which is not yet reported, is printed as Appendix A hereto.

The Scope of Section 205(e) of the Act

Section 205(e) of the Emergency Price Control Act of 1942, as amended, provides, as far as material to this argument, as follows:

> "If any person selling a commodity violates a regulation, *order*, or price schedule *prescribing* a maximum price or maximum prices * * * the person who buys such commodity * * * may * * * bring an action against the seller on account of the *overcharge* * * * For the purposes of this section the payment or receipt of rent shall be deemed the buying or selling of a commodity, as the case may be; and the word 'overcharge' shall mean the amount by which the consideration *exceeds* the *applicable* maximum price. * * *" (Emphasis supplied).

It is evident that the only "overcharge" that will sustain an action under Section 205(e) of the Act is a charge that "exceeds" the maximum price "applicable" at the instant it is made. It is also evident that the violation must be of an order "prescribing" a maximum price.

The initial inquiry is as to what was the maximum rent *prescribed* by regulation or order on the dates the rents in question were demanded or received. These housing accommodations concededly having been rented for the first time after the effective date of the Rent Regulation, the matter is controlled by Section 4(c) of such Regulation, which provides that in such case the "Maximum rents (unless and until changed by the Administrator as provided in Section 5) shall be: * * * the first rent * * *. The Administrator may order a decrease in the maximum rent as provided in Section 5(c)."

Accordingly, the *legal* maximum rent *prescribed* by the Regulation was the *first rent,* and that figure continued to be the allowable rent unless and until changed by the Administrator. When the landlord collected that first rent and like amounts on succeeding rental dates, no reduction having been ordered, he could not conceivably have been violating a regulation *prescribing* a maximum rent.

Effect of Failure to Register First Rent

Section 7 of the Rent Regulation required the landlord to register that first rent within 30 days, and provided that if he failed to do so "the rent received for any rental period commencing on and after the date of the first renting * * * shall be received *subject to refund to the tenant* of any amount in excess of the maximum rent which may later be fixed by an order under Section 5(c)(1). Such amount shall be refunded to the tenant within 30 days after the date of the issuance of the order. If the Administrator finds that the landlord was not at fault in failing to file a proper registration statement within the time specified, the order under Section 5(c)(1) may relieve the landlord of the duty to refund." It was optional, therefore, with the Administrator whether the landlord should make refund even though the maximum rent might be reduced, and even though registration was not timely made.

But by failing to register within the 30-day period, the landlord, despite the fact that he had violated Section 7 of the Regulation, did not automatically become liable to refund anything. Such a liability accrued only if and when the Ad-

ministrator, acting under Section 5(c)(1), ordered a decrease of the first rental amount on the ground that it was "higher than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on the maximum rent date." If the first rent was not excessive within that definition it remained the legal maximum rent, and there was nothing to refund. If it was not excessive and the landlord had failed to register at all, the Administrator, to secure compliance with Section 7 of the Regulation, had his injunctive remedy to compel registry under Section 205 (a) of the Act and could seek the criminal sanction created by Section 4 of the Act. If it was excessive, but the Administrator believed the failure to register in apt time was not the landlord's fault, he need not order a refund.

Scope of a Rent Reduction Order

Petitioner consistently refers to "retroactive rent reduction orders." This is misleading in its implication that an indivisible order reducing the rent and ordering a refund is issued. The rent reduction order and the refund order are distinctly separable in character and effect even though they be combined in one instrument. They stem from separate sections of the Regulation. The right to issue a rent reduction order depends exclusively upon a comparison of the first rent with "the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on the maximum rent date." The right to issue a refund order, on the other hand, exists only if there has not been a timely registration of a first rent.

The legal basis for a rent reduction order must exist before a refund order can come into existence. But the converse is not true, for a rent reduction order can validly issue whether or not there is any legal basis for a refund order. A refund order definitely is not an order "prescribing" a maximum rent. It is simply an optional adjunctive order the existence and validity of which depend upon another order, a rent reduction order.

A rent reduction order is an order "prescribing" a maximum rent, but it is prospective, not retroactive, in essence, scope and intent. When such an order is issued, the reduced

rent specified therein supersedes the first rent as the maximum rent, but the newly fixed rent does not become effective until the next rent payment date. If thereafter the landlord charges more than the new figure, he is, of course, violating an *order* prescribing a maximum rent, just as he would have been violating a *regulation* prescribing a maximum rent had he collected more than the first rent in the succeeding rental period.

But when a landlord violates a refund order, he is not violating an order prescribing a maximum rent, for such an order does not *prescribe* any figure. It merely uses the figure prescribed by the rent reduction order as a basis for calculation of the amount of refund.

Enforcement of Refund Provision

The refund provisions of Section 4(e) of the Rent Regulation can be justified only as an exercise of the right granted the Price Administrator by Section 2(g) of the Emergency Price Control Act to include in regulations, orders and requirements under the Act "such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof."

In stipulating in the Rent Regulation that if he did not make timely registration of his first rent and if the same was thereafter reduced by order under Section 5(c)(1), the landlord might be required to make refund, the Administrator was exercising that right.

But he was also giving public notice to landlords of what their liability, and its extent, might be, and he made no mention of the imposition of damages in the nature of penalties. The Administrator was as firmly bound by his regulation as were landlords. See *M. Kraus & Bros. v. United States*, 327 U.S. 614, 621, as applied in *Porter v. Block*, 156 F. 2d 264, 269-270 (C.C.A. 4th, 1946), and compare the concurring opinion of Magruder, J., in *Senderowitz v. Clark*, 162 F.2d, 912, 918 (E.C.A., 1947). He could not, therefore, inform landlords that the late registrations would subject them only to refunds, and thereafter seek to penalize them in three times the amount of the refunds. When, as here, petitioner brings suit on behalf of the United States under Section 205(e) of

the Act, he is seeking "damages in the nature of penalties," *Porter v. Warner Holding Co.*, 328 U.S. 395, 401-402, and he is unlawfully attempting to make that penal which was not penal when done, since the first rents were lawful when collected. This he cannot do by regulation, by order, or by interpretation; he cannot enlarge Section 205(e). *Morrill v. Jones*, 106 U.S. 466; *United States v. Eaton*, 144 U. S. 677; *Porter v. Block*, 156 F.2d 264, 269-270 (C.C.A. 6th, 1946); *Bowles v. Griffin*, 151 F.2d 458, 461 (C.C.A. 5th, 1945). Significantly enough, the Administrator never sought certiorari in the Block and Griffin cases.

That the Administrator, when writing the Rent Regulation, did not consider that a refund order "prescribes" a maximum rent so as to make disobedience of it a violation within the terms and intendment of Section 205(e) of the Act is shown by Section 4(e) of the Rent Regulation itself, for it says that the refund shall be of "any amount in excess of the maximum rent which may *later be fixed* by an *order* under Section 5(c)(1)," and *not* of any amount in excess of the maximum rent *fixed* by the refund order itself.

Petitioner would read into Section 205(e) of the Act something that is not there. On page 9 of his petition for a Writ of Certiorari he says that the section "clearly gives a course (cause) of action to a tenant or to the Administrator for a violation of a regulation or order prescribing a maximum rent *resulting in an overcharge.*" (Italics his). The difficulty is that the words "resulting in an overcharge" do not appear in Section 205(e). Even if they did, however, they would refer only to the rent reduction order, not the refund order, for it is the reduction order alone which could both (1) "prescribe" a maximum rent and (2) *result in an overcharge.* Both these factors must appear in the equation thus stated by petitioner, and a failure to obey a *refund* order does not contain both, even if it be assumed, *arguendo*, that the order results in an overcharge.

The gist of the violation charged here is violation of the refund order, not violation of the rent reduction order. There could be no violation of the latter order retroactively. Before petitioner's theory could be sound, it would be necessary for Section 205(e) of the Act to provide that if any

person selling a commodity violates a regulation or order prescribing a maximum price, *or an order based on any such regulation or order* and an overcharge results, a treble damage suit will lie. But neither the Administrator nor this petitioner could enlarge the penal terms of Section 205(e). *Morrill v. Jones, supra,* 106 U.S. 466; *United States v. Eaton, supra,* 144 U. S. 677.

The *penal* liability of the landlord, as distinguished from his liability to refund, must be determined by the circumstances existing *at the time* he collected the rents in question. At that time he was complying with a regulation prescribing that his maximum rent should be the first rent charged, and he was in violation of no regulation or order prescribing a maximum rent. To be sure, he was required to register such rent figure within 30 days thereafter, but his failure to do so could not place him in the position of violating an order prescribing a maximum rent, since his legally allowable rent continued to be the first rent. It might so continue during the entire period of rent control if it did not exceed "the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on the maximum rent date." (Rent Reg., sec. 5.). And this would be true regardless of whether a registration statement was filed in apt time, or at all.

Therefore, since at the time the rent collections in question were made, they were made in *conformity* with a regulation prescribing a maximum rent and were not made in violation of an existing order prescribing a lower maximum rent, the landlord could not be subjected to civil penalties. His sole liabilities were to refund, and, if his failure to register was wilful, a criminal prosecution.

Analysis of Retroactive Pricing Order Cases

True, damage suits under Section 205(e) of the Act based on so-called retroactive pricing orders have been upheld, but they are readily distinguishable from the instant case. In each of them the fact was that the maximum price fixed by the retroactive order was not a new and different price, the order merely specifying the price that in legal contemplation existed from the beginning. It was the price that the seller either could have known or calculated from, or

have caused to be determined under, the applicable regulation *before* he ever made the sale; and he was bound, as a matter of law, to know or to ascertain such price *before* selling at all. In short, he was *in violation* at the very time he collected the sales price. *Porter v. Kramer*, 156 F.2d 687 (C.C.A. 8th, 1946); *Martini v. Porter*, 157 F.2d 35 (C.C.A. 9th, 1946), certiorari denied *sub nom. Martini v. Fleming*, 330 U.S. 848; *Porter v. Senderowitz*, 158 F.2d 435 (C.C.A. 3rd, 1946), certiorari denied *sub nom. Senderowitz v. Fleming*, 330 U.S. 848. Compare *Senderowitz v. Clark*, 162 F.2d 912 (E.C.A., 1947), voiding retroactive effect to the order sued upon in *Porter v. Senderowitz, supra.*

The clear distinction between those cases and the instant one is that in them the seller knew or could have known his correct maximum price before he sold, while here the landlord was collecting only what the regulation specifically authorized him to collect, and had no conceivable means of knowing whether his maximum rent would later be reduced at all, or, if reduced, what the new figure would be. In fact, the Administrator himself could not know that the legal first rent would not continue as the maximum rent until such time as he compared the first rent with the rents for comparable housing accommodations in the area.

The Effect on Enforcement

It is readily agreed that the decision in this case involves a question of great importance to the due administration and enforcement of the Emergency Price Control Act and the Housing and Rent Act of 1947. But petitioner has a blind spot that has prevented his seeing one of the most cogent reasons why that is true. In his zeal to recover treble damages for the United States Treasury, he has forfeited the rights of one of his most important *cestuis que trust*, namely, the tenant, for whose protection the refund provisions of the Rent Regulation were expressly designed. In suing on behalf of the United States, petitioner has ignored the fact that no part of any recovery of damages can be paid to the tenant.

From pages 6 to 8 of the Petition for Writ of Certiorari herein it appears that there are probably 650 cases like this

one pending throughout the country, and that the Housing Expediter will continue to bring like actions under the Housing and Rent Act of 1947.

Thus, in those 650 instances there has been, and in countless cases in the future (for the regulation issued under the Housing and Rent Act of 1947 says nothing of treble damages) there will be a complete disregard of the rights of the tenant. Lulled as he is by the rent regulations into the feeling that his refund rights will be protected, and unadvised as he is of petitioner's theory that he, the tenant, has a treble damage claim, he discovers those rights have been annihilated by petitioner's action in suing under Section 205(e) for the benefit of the United States Treasury, when an action by petitioner under Section 205(a) would accomplish the express purpose of Section 4(e) of the Rent Regulation by compelling return to such tenant of the amount he has overpaid.

It must be granted, of course, that in the public interest compliance with the statutes and rent regulations must be had, and that a landlord cannot be permitted with impunity to flaunt the requirement that he must register his first rent within 30 days. But it certainly does not follow that the sole means of coping with evaders is a suit to recover damages exclusively for the United States Treasury. Until recently, enforcement of the Emergency Price Control Act—except to the minds of those who have been penalized in treble damages—has never been thought to be a money raising enterprise for the Treasury.

To the contrary, an integral part of the price control plan has always been the protection of the consumer and tenant and the return to them of what was illegally taken. That protection, this Court has seemed to feel, is important. *Porter v. Warner Holding Co.*, 328 U. S. 395, 402. The remedy giving complete protection to a tenant's rights has always been ready at hand to the Housing Expediter. "Appropriate and necessary to enforce compliance with the Act," as this Court said, it is an order for restitution or refund under Section 205(a) of the Act. *Porter v. Warner Holding Co., supra*, 400. Plainly, no limitation runs against its enforcement, absent such long knowledge and inaction concern-

ing violations as to impute laches, but violations of Section 205(e) on the other hand, must go unpunished if not sued upon within one year from their occurrence, regardless of the time of discovery.

In *Porter v. Warner Holding Co., supra,* 328 U. S. 395, 402, it is said:

> "Restitution, which lies within that equitable jurisdiction, is consistent with and differs greatly from the damages and penalties which may be awarded under Section 205(e). *Bowles v. Skaggs, supra,* 821. When the Administrator seeks restitution under Section 205(a) he does not request the court to award statutory damages to the purchaser or tenant or to pay to such person part of the penalties which go to the United States Treasury in a suit by the Administrator under Section 205(e). Rather he asks the court to act in the public interest by restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant. Such action is within the recognized power and within the highest tradition of a court of equity. Thus it is plainly unaffected by the provisions of Section 205(e)."

Wrongdoer May Not Benefit From Own Wrong

What has been said above also disposes of petitioner's apprehension that a treble damage suit is the only means of preventing a landlord from gaining advantage from his own wrong.

The real duty of the Housing Expediter is to advise the tenant of his refund rights and enforce them for him, and not, as the Expediter mistakenly believes, to make punishment of the landlord the primary concern. If the wrongdoer is forced to give back that which he has obtained illicitly, the score is settled. That result can be obtained with precision by the action under Section 205(a) of the Act.

CONCLUSION

It is respectfully submitted that petitioner has mistaken his remedy in this case, and that the judgment of the Court of Appeals should be reversed, with instructions to order dismissal of the action.

Respectfully submitted.

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January, 1948

APPENDIX A.

Copy.

IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT

County of Los Angeles, State of California

PHILIP E. FLEMING, Temporary Controls, *Plaintiff and Respondent* vs. O. L. BANKS, *Defendant and Appellant*	Superior Court No. Civ A 6536 Trial Court No. 771,-909

MEMORANDUM OPINION.

Appeal by defendant from a judgment made by the Municipal Court of the City of Los Angeles, C. Newell Carns, Judge. Reversed with directions to dismiss.

This action was brought by the Price Administrator, for whom the present plaintiff was later substituted, claiming to act under the authority of section 205(e) of the Emergency Price Control Act of 1942, as amended (sec. 925(e), Title 50, App. U.S.C.A.), to recover treble damages on account of an alleged overcharge of rent made by defendant, between October 1943 and September 1945, in a case where the tenant had failed to sue. Plaintiff's demand is based on the failure of defendant, who was the landlord of housing accommodations subject to the Rent Regulation for Housing and rented for the first time after such regulation became effective, to refund to his tenant the excess of the rent collected by him over the rent fixed by a retroactive order of the Area Rent Director made after the defendant had received the rent, and on the failure of defendant to file a registration statement as required by the regualtion. Plaintiff sued for and recovered treble the amount of this excess.

We held in *Lentz* v. *Ebright* (1947), L. A. Civ A 6404, that the Emergency Price Control Act does not authorize a treble damage action in such a case. Since that case was decided other cases involving the same question have been

argued and are before us for decision. We have therefore reviewed the grounds of our former decision and upon further consideration, we adhere to it, and state more fully our reasons for the conclusion.

The Rent Regulation above referred to was made by authority of the Emergency Price Control Act. Section 4 of this regulation provided for rent ceilings, which in case of the properties here involved were "the first rent for such accommodations . . . after the effective date" of regulation (sec. 4, subd.(e)). It also required the landlord, within thirty days after this first renting, to file a registration statement, and provided that if he did not do so "the rent received . . . shall be received subject to refund to the tenant of any amount in excess of the maximum rent which may later be fixed by an order" which, by the terms of other sections, may be made by the Area Rent Director. It further provided that "such amount shall be refunded to the tenant within 30 days after the date of issuance of the order." Some exceptions were made to "the duty to refund," but none of them is applicable here. Section 5(c)(1), under which the order relied upon by the plaintiff was made, plainly recognizes that the rent received was the maximum rent when received and until the order of reduction was made; only then did the maximum rent become less than the amount received. Applying these provisions to the facts of the present case, we find that when the rents collected by defendant were received by him they were the ceiling rents for the properties in question and that in receiving them the defendant was violating neither law nor regulation, but by reason of defendant's failure to file a registration statement, his right to retain the whole of the sums received was conditional; that is, if the Rent Director later made an order fixing the rent for the same period of time at a sum less then that received by defendant, the latter came under a "duty to refund" the excess to his tenant within thirty days. This the defendant did not do. The effect of his failure must be determined by the provisions of the Emergency Price Control Act.

Section 205(e) of that act (sec. 925, Title 50, App.U.S.C.A.) provided that for the purposes of that section "the payment or receipt of rent for defense-area housing accom-

modations shall be deemed the buying or selling of a commodity, as the case may be;" or, applying this definition directly to the present case, the receipt of rent by defendant is to be deemed the selling of a commodity. This section further provided that "If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity . . . may, within one year from the date of the occurrence of the violation, . . . bring an action against the seller on account of the overcharge" and may recover as much as three times the overcharge, with attorney's fees, and also that if, in such case, the buyer fails to sue within 30 days after the violation, the Administrator may bring the action in behalf of the United States. In stating or quoting this section we omit various provisions not germane to the present question. In cases such as we have here, the right of the Administrator to sue under this section is plainly derivative and dependent upon the existence of a cause of action in the buyer which the latter has neglected to pursue.

What, then, was the right of the buyer (tenant) in this case? He could sue only if the "person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices." By definition the "person selling" here is the defendant receiving rent. His conduct in so doing must be judged by the conditions existing when he received the rent. Unless at that time he violated some regulation, order or price schedule fixing prices, there was no "person selling" who did so. At the time defendant here received the rent in question it is clear that he did not violate any such regulation, order or price schedule. At that time there was no order, and the regulation authorized him to receive the amount he did receive. No price schedule is involved here.

It has been suggested that because the regulation provided that in such a case as this "the rent received . . . shall be received subject to refund" the rent can be regarded as constructively received when the order fixing the rent is made, and not sooner. But this theory is contrary to the very words of the regulation, which is not concerned with metaphysical abstractions but with actual facts, as plainly appears from the words just quoted. Nor do we see anything

in the statute to suggest that in speaking of "the payment or receipt of rent" it was concerned with anything but actual facts. Section 205(e) (Sec. 925(e), Title 50, App. U.S.C.A.), in dealing with the damages recoverable in the action there authorized, used several times the word "overcharge" and limited those damages to a maximum of three times the overcharge or $50.00, whichever is greater. It also defined the term "overcharge" as "the amount by which the consideration exceeds the applicable maximum price." These are words of the present, not the future, and indicate that a determination of the excess is to be made as of the date the transaction takes place, rather than some future time. If at that date there is no applicable maximum price, or there is one but it is not exceeded, there is no overcharge, in the view of the statute.

It is to be noted also that it is the violation of "a regulation, order or price schedule prescribing a maximum price or maximum prices" which generates a cause of action for treble damages, not merely a violation of any regulation or order. There was here a regulation prescribing maximum prices (rents), but it was not violated. There was also an order retroactively reducing the rents fixed by the regulation, but it was not violated in the receipt of rent because then non-existent. What was violated was a regulation requiring a refund of part of rents which were in violation of nothing when received but became excessive thereafter because of the retroactive order. This is not a regulation prescribing maximum prices (rents). By section 2 of the Emergency Price Control Act (Sec. 902, Title 50, App. U.S.C.A.), the Administrator may by regulation or order establish maximum prices (subd.(a)) and maximum rents for housing accommodations (subd. (b)), and may also place in his regulation and orders "such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof." (Subd. (g).) The provisions of the regulation for refunds of rents declared excessive were of the last mentioned class, that is, they were ancillary to the price (rent) fixing regulations and orders, and might assist in preventing circumvention or evasion thereof, but they were not of themselves price fixing regulations. Congress saw fit to limit its provisions for treble damages to violation of

orders and regulations which were price fixing; it did not extend them to other orders and regulations which the Administrator might be authorized to make. We see no reason for extending them to such other orders by interpretation. A violation of such provisions may nevertheless not be without consequences to the violator, for it seems it would be subject to the provisions of sections 4(a) and 205(b) of the Act (Secs. 904(a) and 925(b), Title 50, App. U. S. C. A.), which together made it a crime to violate any regulation or order made under section 2 (Sec. 902, Title 50, App. U.S. C.A.).

To construe the statute as imposing on a landlord a treble damage penalty for receiving rent which was lawful when received would give it an effect similar to that of an ex post facto law, which is prohibited to Congress by the United States Constitution (Sec. 9, Art. I). An ex post facto law is but a particular instance of retrospective legislation, using that term in its most general sense (16 C.J.S. 856; *Shwab v. Doyle* (1922), 258 U.S. 529, 534; 66 L. ed. 747, 752). Even in cases where a retrospective law is not prohibited, such effect is not favored but will be given to a law only where it is plainly expressed. (12 Cor. Jur. 1091; *Shwab* v. *Doyle*, supra; *Miller* v. *U. S.* (1935), 294 U.S. 435, 439; 79 L. ed. 977, 981; *Claridge Apts. Co.* v. *Com'r of Int. Rev.* (1934), 323 U.S. 141, 164, 89 L. ed. 139, 153.) It may be that technically this act would not be a retrospective or ex post facto law, even if given the construction just mentioned; but the reason on which the condemnation of those laws is based, that they make unlawful, or even penalize, acts which were lawful when done, would be equally applicable here, and the rule against retroactive construction should be likewise applied here.

We are aware that some decisions of Federal District Courts may be cited as in opposition to our conclusion, for they award treble damages in cases like that now before us. But it does not appear that the questions we have considered were presented to those courts, and they were not discussed in the opinions. The matter under consideration in all of them was the time when the statutory period for beginning the action began to run. The several courts assumed, with little or no discussion, that the administrator or the tenant, as the case might be, had a cause of action for treble damages.

by reason of failure of the landlord to refund to the tenant the excess of rent received over that fixed by a retroactive order, and went on from there to hold that the statutory time began to run at the expiration of the time which the regulation or order allowed the landlord in which to make the refund. If we accepted this assumption, we would not find great difficulty in agreeing to the conclusion as to time; but we cannot regard these apparently unreasoned conclusions of trial courts as establishing a rule on a Federal question which we must follow notwithstanding our definite opinion to the contrary. The cases referred to are: *Haber* v. *Garthly* (1946), 67 F. Supp. 774, 776; *Parham* v. *Clark* (1946), 68 F. Supp. 17; *Porter* v. *Butts* (1946), 68 F. Supp. 516, 518; *Porter* v. *Sandberg* (1946), 69 F. Supp. 29, 31; *Porter* v. *Stricklin* (1947) 71 F. Supp. 5, 7. *Bowles* v. *Babcock* (1946), 65 F. Supp. 380, while of doubtful import in regard to the time limit, agrees with the other cases just cited in making the assumption above mentioned.

Other questions have been presented and argued but in view of our conclusions already stated we deem it unnecessary to discuss them.

The judgment is reversed, with directions to dismiss the action, without costs of appeal to either party.

Dated October 3, 1947.

SHAW

Presiding Judge

SUPREME COURT OF THE UNITED STATES

No. 392.—October Term, 1947.

Tighe E. Woods, Housing Expediter, Office of Housing Expediter, Petitioner, *v.* Charles Stone.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[March 15, 1948.]

Mr. Justice Jackson delivered the opinion of the Court.

Respondent Stone owned a house in Mooresville, Indiana which he rented to one Locke for $75 per month beginning on or about August 1, 1944. As this was the first rental of the premises, the applicable law [1] and regulations [2] imposed on the owner a duty to file a registration statement within thirty days.

The respondent failed to register the property. He sold it in April 1945 and registration by the new owner

[1] Emergency Price Control Act of 1942, 56 Stat. 23, as amended by Stabilization Extension Act of 1944, 58 Stat. 632, 50 U. S. C. App., Supp. V, § 901 *et seq.*

[2] Section 7, Rent Regulations for Housing, 8 Fed. Reg. 14663, 10 Fed. Reg. 3436, providing in part as follows: *Registration*—(a) *Registration statement.*—On or before the date specified in Schedule A of this regulation, or within 30 days after the property is first rented, whichever date is the later, every landlord of housing accommodations rented or offered for rent shall file in triplicate a written statement on the form provided therefor to be known as a registration statement. The statement shall identify each dwelling unit and specify the maximum rent provided by this regulation for such dwelling unit and shall contain such other information as the Administrator shall require. The original shall remain on file with the Administrator and he shall cause one copy to be delivered to the tenant and one copy, stamped to indicate that it is a correct copy of the original, to be returned to the landlord . . . .

brought notice to the Area Rent Director of respondent's prior renting of the property without complying with the registration requirement. On June 28, 1945, the Director, pursuant to the regulations, reduced the rental from $75 to $45 per month, effective from the first rental, and ordered the excess refunded within thirty days thereafter. Respondent failed to refund, the tenant did not sue and this action was instituted by the Price Administrator. The District Court and the Court of Appeals, among other things, held that the one-year statute of limitations ran from the dates of payment of the rentals. 163 F. 2d 393. This conflicted with the holding of the Court of Appeals for the Fourth Circuit which, under similar circumstances, held that the limitation period started upon default in refunding the excess within thirty days after the refund order. *Creedon* v. *Babcock*, 163 F. 2d 480. We granted certiorari limited to this question. 332 U. S. 835.

No question is raised, and none could have been raised in this proceeding, as to the validity of the relevant regulations and the refund order, either on the ground of retroactivity or otherwise, because any challenge to the validity of either would have to go to the Emergency Court of Appeals. 50 U. S. C. App., Supp. V, § 924; *Bowles* v. *Willingham*, 321 U. S. 503. See also *Woods* v. *The Cloyd W. Miller Company*, 333 U. S. 138. Taking the legislation, the regulations and the order to be valid exercises of governmental power, as we are thus required to do, the only question before us is when do excessive collections by the landlord begin to enjoy the shelter of the statute of limitations?

Under the system of rent control as established, a landlord is required to register rented accommodations within thirty days after they are first devoted to that use. This brings notice to the control authority that the premises are within its official responsibility and provides data for

quick, if tentative, determination as to whether the rental exacted exceeds the level permitted by the policy of Congress set out in the statute.

But when, as in this case, the landlord does not comply with this requirement, there is likelihood that, as happened here, his transaction will be overlooked for some time or perhaps escape scrutiny entirely. But the landlord is not allowed thus to profit from his own disobedience of the law. If he could keep the excess collections by thus retarding or preventing scrutiny of his contract, he would gain an advantage over all landlords who complied with the Act as well as over tenants whose necessity for shelter is too pressing to admit of bargaining over price. The plan therefore provides that, despite his failure to register, the landlord may continue to collect his unapproved price, but only on condition that it is subject to revision by the public authority and to a refund of anything then found to have been excessive.[3]

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[3] Section 4, Rent Regulations for Housing, 8 Fed. Reg. 14663, 10 Fed. Reg. 3436, providing in part as follows: *Maximum rents*—(e) *First rent after effective date.*—For (1) newly constructed housing accommodations without priority rating first rented on or after the effective date of regulation, or (2) housing accommodations changed on or after such effective date so as to result in an increase or decrease of the number of dwelling units in such housing accommodations, or (3) housing accommodations not rented at any time during the two months ending on the maximum rent date nor between that date and the effective date, the first rent for such accommodations after the change or effective date, as the case may be, but in no event more than the maximum rent provided for such accommodations by any order of the Administrator issued prior to September 22, 1942. Within 30 days after so renting the landlord shall register the accommodations as provided in § 7. The Administrator may order a decrease in the maximum rent as provided in § 5 (c).

If the landlord fails to file a proper registration statement within the time specified (except where a registration statement was filed prior to October 1, 1943), the rent received for any rental period commencing on or after the date of the first renting or October 1,

The plan of the statute and the regulations issued pursuant to it was applied in this case. The landlord failed to register the property. His rental operations escaped notice of the authorities until fortuitously disclosed. He collected as he had a right to do, but subject to readjustment, a rental fixed by himself that was found on inquiry to exceed by 66-2/3% what was fair rental value of the property. He was ordered to refund the excess. He now contends that he can keep all of it that he collected upwards of a year before the action was commenced, upon the ground that the one-year statute of limitations runs,[4] not from the date of his default in obeying the refund order, but from the date of each collection of rental.

We cannot sustain his contention. The statute and regulations made his rentals tentative but not unlawful.

1943, whichever is the later, shall be received subject to refund to the tenant of any amount in excess of the maximum rent which may later be fixed by an order under § 5 (c) (1). Such amount shall be refunded to the tenant within 30 days after the date of issuance of the order . . . .

[4] Section 205 (e) of the Act as amended, 50 U. S. C. App., Supp. V, § 925 (e) provides: If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge . . . . For the purposes of this section the payment or receipt of rent for defense area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be . . . . If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period . . . .

The functions of the Administrator were subsequently transferred to the Housing Expediter who appears as petitioner here.

Until the contingency of readjustment occurred, the tenant could have had no cause of action for recovery of any part of the rental exacted by the landlord. The cause of action now does not rest upon, and hence cannot date from, mere collection. The duty to refund was created and measured by the refund order and was not breached until that order was disobeyed. It would be unusual, to say the least, if a statutory scheme were to be construed to include a period during which an action could not be commenced as a part of the time within which it would become barred. *United States* v. *Wurts*, 303 U. S. 414. We think no such result was expressed or intended. It was from the violation which occurred when the order was not obeyed within the required time that the statute of limitations commenced to run. *Cf. Rawlings* v. *Ray*, 312 U. S. 96; *Fisher* v. *Whiton*, 317 U. S. 217; *Cope* v. *Anderson*, 331 U. S. 461.

It is now suggested that no cause of action can be based on a refund order, irrespective of its validity. As we have pointed out, the validity of the regulation and order are conclusive upon us here. This cause of action is based upon violation of an "order . . . prescribing a maximum [rent] . . . ." The command to refund cannot be treated as a thing apart, but must be taken in its setting as an integral and necessary part of the order fixing the maximum rent. It was this order that was disobeyed. It would be a strange situation if there were authority to order the landlord to make a refund but no legal obligation on his part to pay it. We think it clear that default in obedience to the requirement of refund gives rise to the cause of action sued upon herein.

It is also suggested that the refund order applies the law to the landlord retroactively. Quite apart from the fact that this is an objection to the order itself rather than to the question of limitation of time, we think the suggestion to be without merit. This is not the case of a

new law reaching backwards to make payments illegal that were free of infirmity when made. By legislation and regulation in force before the collections were made, the landlord's own default in registering had rendered these payments conditional, subject to revision and to refund. Readjustment under these conditions cannot be said to be retroactive law making.

We hold that the one-year statute of limitations began to run on the date that a duty to refund was breached, and on this point only we reverse the judgment of the court below.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 392.—October Term, 1947.

Tighe E. Woods, Housing Expediter, Office of Housing Expediter, Petitioner, *v.* Charles Stone.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[March 15, 1948.]

Mr. Justice Frankfurter, concurring.

I had supposed that no rule of judicial administration was better settled than that the Court should restrict itself to the questions presented in a petition for certiorari. This is especially true where, as here, the petition was granted but "limited to the question as to the statute of limitations presented by the petition for the writ, and the case is transferred to the summary docket." 332 U. S. 835. The exceptions to this rule are rare, as where the jurisdiction of this Court or of the lower courts is plainly wanting, or where a patent error *in favorem vitae* is to be noted. In any event, it is clear that this case could not be one of them. The exclusive jurisdiction provisions of the Emergency Price Control Act may well preclude our consideration of the validity of the "retroactive order." But since an issue other than that pertaining to the statute of limitations has been dealt with, I would like to add a few words to Mr. Justice Jackson's opinion, inasmuch as his immoderate restraint does not lay bare the "merits" of the controversy.

The crux of the matter is that where a landlord rents new housing accommodations but, as here, disobeys the regulatory scheme and fails to file a registration statement, if he chooses to collect the rent that he himself has

fixed, he can do so only contingently. The Administrator may catch up with him and fix what was the proper amount from the beginning. The excess is illegal and must therefore be refunded.

There is nothing novel about a regulatory scheme whereby landlords who violate the law are denied the right to profit thereby. It has consistently been upheld by the Emergency Court of Appeals. *150 East 47th Street Corp.* v. *Creedon*, 162 F. 2d 206; see *Senderowitz* v. *Clark*, 162 F. 2d 912, 917; cf. *Easley* v. *Fleming*, 159 F. 2d 422. When Congress provided in § 2 (g) of the Act that regulations "may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof," 56 Stat. 23, 27, 50 U. S. C. Supp. V, § 902 (g), it plainly authorized effective administrative remedies for dealing with evasion.

If such an order is to be termed "retroactive," it comes within the Court's recent ruling that "such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal or equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law." *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194, 203.

SUPREME COURT OF THE UNITED STATES

No. 392.—October Term, 1947.

Tighe E. Woods, Housing Expediter, Office of Housing Expediter, Petitioner, *v.* Charles Stone.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[March 15, 1948.]

Mr. Justice Douglas, dissenting.

I think it is plain that a "refund order" is not a maximum rent order since it does more than fix a rent ceiling. I would not stretch a point to call it such, in view of the aversion our law has to the creation of retroactive liabilities. The Court finds fairness in the result because of the special circumstances of the case. Yet it recognizes a cause of action created not by Congress but by those who administer the law. That cause of action is written into the statute through the addition of retroactive liabilities.

The rent collected by this landlord was the maximum rent which he could at the time lawfully collect. At no time did he collect rent in excess of the ceiling then prevailing.[1] Almost a year later the ceiling was reduced—from $75 a month to $45 a month—and the reduction was made retroactive by a "refund order." The landlord is now sued by the government for treble the amount of the so-called overcharge.

The statute gives a right of action against anyone who collects more than the prescribed maximum price or rent.

[1] The maximum rent for the type of housing involved here was the first rent after the effective date of the regulations, *viz.*, $75 a month. See Rent Regulation for Housing, § 4 (c) (3), 8 F. R. 14663, 10 F. R. 3436.

§ 205 (e).[2] No right of action to sue for overcharges prescribed by a "refund order" is contained in § 205 (e) which defines the cause of action and the statute of limitations with which we are presently concerned.[3] The cause of action there described is based on a violation of a maximum rent order. The statute of limitations runs "from the date of the occurrence of the violation." It will not do to say that the date of the violation in this situation must relate to the "refund order" because prior thereto there was no violation. Such an interpretation rewrites § 205 (e) and creates a cause of action not only for violating a rent ceiling but also for violating a "refund order." That changes the scheme of the section. The right to obtain a return of money paid normally turns on conditions existing when it was paid. The statute of limitations usually starts to run then and not at some later time. Certainly it is novel law which makes the legality of rent payments turn on the unpre-

[2] Section 205 (e) provides, so far as here material, as follows: "If any person selling a commodity violates a regulation, order, or price schedule *prescribing a maximum price* . . . the person who buys such commodity . . . may, within one year from the date of the occurrence of the violation, . . . bring an action against the seller on account of the overcharge . . . . For the purposes of this section the payment or receipt of rent . . . shall be deemed the buying or selling of a commodity, as the case may be; and the word 'overcharge' shall mean the amount by which the consideration *exceeds the applicable maximum price.*" (Italics added.)

[3] It may be that the Administrator could sue to compel compliance with the refund order under § 205 (a). See *Porter* v. *Warner Co.*, 328 U. S. 395. There may be other remedies arising from respondent's failure to file a registration statement. Thus § 4 (e) of the Rent Regulations for Housing states: "The foregoing provisions and any refund thereunder do not affect any civil or criminal liability provided by the Act for failure to file the registration statement required by section 7." There is no need to canvass those possibilities here as § 205 (e) supplies the only basis for petitioner's judgment in this case.

dictable future action of an official who in the exercise of his discretion determines that a lower rental should have been paid. Yet the Court has to enter that field of retroactive law in order to make a "refund order" a maximum rent order for the purposes of § 205 (e).

Congress here said in effect that all payments for housing and commodities in excess of the prevailing ceiling were unlawful; and all payments at the ceiling were lawful. The Court in its construction of § 205 (e) does violence to that policy. For it expands the statutory cause of action so as to penalize those who in yesterday's transactions exacted no more than the law and regulations permitted. Any such use of retroactive law to construe § 205 (e) makes it most doubtful that Congress ever adopted the meaning now given the section. I would conclude that Congress had taken that course only if it had said so in unambiguous terms. But one who reads § 205 (e) to find any reference to liabilities based on "refund orders" reads in vain. And it is only violations of the orders described in that section which give rise to the cause of action under it.

It is said, however, that no question concerning the validity of the "refund order" can be considered here because any challenge to its validity would have to go to the Emergency Court of Appeals. I do not dispute that view. See *Bowles* v. *Willingham*, 321 U. S. 503; *Yakus* v. *United States*, 321 U. S. 414. For Congress in § 203 and § 204 of the Act provided a special administrative procedure for testing the validity of any provision of a "regulation, order, or price schedule," a procedure the constitutionality of which we have sustained. See *Lockerty* v. *Phillips*, 319 U. S. 182; *Yakus* v. *United States*, *supra*. But we are not here concerned with the power of the Administrator to issue a "refund order." Our question is different and involves only a question of law turning on the meaning of § 205 (e). What we have to decide is whether

a "refund order" is a "regulation, order, or price schedule prescribing a maximum price" within the meaning of § 205 (e). That is the first step in determining the time from which the statutory period of limitations is measured.

In short, the cause of action here at issue can be created only by the statute, not by regulations. The question is not one of validity of the regulations but of statutory interpretation; not an interpretation to determine whether the statute authorizes the regulations, but whether it authorizes the suit.